

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1043-CR

Cir. Ct. No. 2013CF2600

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PORFIRIO VIVEROS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Porfirio Viveros appeals a judgment convicting him after a jury trial of five counts of repeated sexual assault of a child. He also

appeals an order denying his motion for postconviction relief. Viveros makes three claims: (1) the circuit court should have granted his motion for postconviction discovery; (2) trial counsel was ineffective for failing to demand discovery from the State pertaining to whether any of the victims were attempting to obtain a U-Visa; and (3) he is entitled to a new trial in the interest of justice. We affirm.

¶2 Viveros was charged with six counts of repeated sexual assault of a child. There were three child victims under the age of sixteen, and the assaults were alleged to have occurred over an eleven-year period. During the jury trial, the State moved to dismiss one of the charges. Viveros was convicted of the five remaining charges. Viveros filed a postconviction motion, which the circuit court denied.

¶3 Viveros first argues that the circuit court should have granted his motion for postconviction discovery seeking information about whether any of the victims were attempting to obtain a U-Visa. The State’s brief explains that a U-Visa enables the victim of certain crimes, including sexual assault, to stay in the United States for a period of four years in exchange for providing help in the investigation or prosecution of qualifying criminal activity; moreover, the person is eligible to apply for lawful permanent residency after the person has resided continuously in the United States for three years following the receipt of a U-Visa. Viveros contends that the child victims, possibly with the encouragement of their parents, may have fabricated the stories of the sexual assaults in order to qualify for U-Visas.

¶4 A defendant seeking postconviction discovery must “show that the evidence is consequential to an issue in the case.” *State v. O’Brien*, 223 Wis. 2d

303, 323, 588 N.W.2d 8 (1999). The defendant must also show that “had the evidence been discovered, the result of the proceeding would have been different.” *Id.*

¶5 The circuit court denied Viveros’s motion for postconviction discovery on the ground that the information Viveros sought was privileged and confidential under federal law. On appeal, the State concedes that the circuit court’s ruling that the information was privileged and confidential under federal law was incorrect. The State also recognizes cases from other jurisdictions in which evidence that a victim or witness had applied for a U-Visa was allowed to impeach the testimony of the victim or witness. *See State v. Valle*, 298 P.3d 1237, 1243 (Or. Ct. App. 2013) (evidence that a person applied for a U-Visa relevant to show that the person had a personal interest in assisting with prosecution of a defendant); *Romero-Perez v. Kentucky*, 492 S.W.3d 902, 906 (Ky. Ct. App. 2016) (“[o]ne can readily see how the U-Visa program’s requirement of ‘helpfulness’ and ‘assistance’ by the victim of the prosecution could create an incentive to victims hoping to have their U-Visas, [sic] granted.”).

¶6 Although information that a victim is attempting to obtain a U-Visa may be admissible to show that the victim or witness had a motive for testifying against a defendant, Viveros is not entitled to postconviction discovery of the information unless the result of the trial would have been different if Viveros had been provided with the discovery he sought prior to trial. *See O’Brien*, 223 Wis. 2d at 323. We will assume for the sake of argument that the victims did, in fact, apply for U-Visas and that they would have been subject to cross-examination about any motive they may have had to cooperate with the

prosecution as a result.¹ Assuming this information to be true, however, we conclude that the result of the proceeding would not have been different because there was overwhelming evidence of Viveros's guilt.

¶7 The three victims testified in painful detail about Viveros repeatedly assaulting them years earlier when they were very young. The State's brief summarizes the testimony:

B.R. testified that Viveros began assaulting her when she was four or five. While they were on a bed watching cartoons, he pulled down her pants and underwear and would touch her. She testified that he would lick his finger and then touch and rub her on her vagina. B.R. also testified that when she was between five and six, Viveros made B.R. and B.R.'s cousin (victim Y.R.S.) (1) watch pornographic movies and (2) touch each other. Viveros had B.R. touch Y.R.S.'s exposed breasts.

B.R. also told her school counselor about the abuse when she was in the sixth grade. B.R. then told her mother about the abuse. B.R.'s mother took her to therapy, and then she took B.R. to talk to the police when B.R. was about 16 or 17.

Victim H.R.S. testified that she was between five and six when Viveros started sexually abusing her. She described the first time, when Viveros had her sit on his lap while she was playing a video game. Viveros put his hands up H.R.S.'s shirt and over her chest. On the next occasion, he performed oral sex on her while no one else was at her house. On that same occasion, Viveros masturbated and ejaculated on her. H.R.S. also testified that one time Viveros was kissing and touching her and he tried to pull down her pants. She pushed, kicked, and slapped him and ran to the next room. One time Viveros "molested" her while her brother was playing video games. H.R.S. also testified that once Viveros tried to insert his penis in her vagina, but her brother walked in on them.

¹ We emphasize that there is nothing before us that suggests that the victims did, in fact, apply for U-Visas.

When H.R.S. was around twelve, Viveros touched her “butt area,” chest, and stomach over her swimsuit. The last time Viveros has sexual contact with H.R.S. she was around 12 or 13. And, H.R.S. testified about the first time she told her mom about Viveros’s abuse:

[M]y sister (victim Y.R.S.) at the time she was cutting herself. She dealt with it a little bit differently than I did. And so she was the one who told my mom and then my mom went to pick me up from school. I was in high school. And my mom was crying and I was like “mom, what’s wrong?” And then she was like “your sister. Your sister.” I said “what’s wrong with my sister? Did someone do something to her at school?” and she said “no. You won’t believe what happened to her” and I was like “what” and she was like “your uncle.” “My uncle?” she said “yeah, your uncle touched her.”

I was like -- and then I couldn’t believe it. I never knew that he had time to do that too since he was always with me and then I started crying. She said “you knew?” I was like “I never wanted to say anything about it. He did the same thing to me too” and then she -- she started crying.

Victim Y.R.S. testified about how Viveros started sexually assaulting her when she was between the ages of four and five. When it first started, he touched her on her bare vagina. She described how he would insert his fingers in her vagina. This happened more than three times when she was between the ages of five and eight. She testified about other occasions, when he performed oral sex, and that Viveros did this to her more than three times when she was between the ages of five and eight. Y.R.S. would cry, and he would pull down her pants. This occurred in her room on her sister’s ... bed.

Y.R.S. also talked about a time that she was in Viveros’s room and he played a pornographic video. He started performing oral sex on Y.R.S. when her cousin B.R. walked in the room. Viveros then made Y.R.S. (whose clothes were off) touch B.R. while Viveros masturbated.

Y.R.S. then testified about the first time Viveros raped her, when she was around ten. She was wearing her favorite pair of jeans, and he took them off. He put “cream on his penis and put it in and he was doing it to me.” Then he took out his penis and “[w]hite stuff went on my shirt, on my leg.” Finally, Y.R.S. testified that when she was between the ages of eight and twelve, Viveros both licked her vagina and put his fingers in her vagina more than three times.

¶8 In sum, then, all three victims gave detailed accounts about Viveros’s repeated sexual abuse. B.R.’s testimony was corroborated by her school counselor, who testified that B.R. told her about the assaults in 2010, years before these prosecutions began. Moreover, the victims’ mothers testified about how and when they learned about the assaults. Given the extensive and detailed testimony, the fact that any of the victims or their families sought to avail themselves of the U-Visa program, if true, would not have made a difference on the outcome of the trial. Therefore, Viveros was not entitled to postconviction discovery regarding the U-Visas.

¶9 Viveros next argues that trial counsel was ineffective for failing to demand discovery from the State pertaining to the U-Visa issue. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Carter*, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). As we previously explained, even if the victims and/or their families had applied for U-Visas and that information had been used to challenge the victims’ motives for testifying at trial, the result of the trial would not have been different. Therefore, Viveros cannot show that counsel’s alleged omission

prejudiced him. We reject Viveros's claim that he received ineffective assistance of counsel.

¶10 Finally, Viveros contends that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. *See* WIS. STAT. § 752.35 (2015-16).² Viveros contends the real controversy was not fully tried because he was not allowed to challenge the credibility of the victims by showing that they had an ulterior motive for testifying against him. This argument simply rehashes Viveros's previous arguments, which we have rejected. Therefore, we will not exercise our discretionary authority under § 752.35 to order a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

